

On the other hand, claimant filed a Motion for Dismissal of Review and, if not granted, raises the issue of claimant's average weekly wage.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record, considering the briefs and argument of the parties, the Appeals Board finds as follows:

Before we reach the issues for review, the Appeals Board will address claimant's Motion for Dismissal of Review. In an effort to improve the review process, the Appeals Board, in its Notice of Hearing and Briefs Due, requests each of the parties to file a brief by a certain date. In this particular case, the appellant, hereinafter referred to as the respondent, was requested to file a brief by March 29, 1995, and the appellee, hereinafter referred to as the claimant, was requested to file a response brief by April 10, 1995. Respondent failed to comply with this request and the claimant, therefore, filed a Motion for Dismissal of Review before the Appeals Board on April 6, 1995. Respondent filed a response to claimant's motion on April 10, 1995. Respondent argues that the Appeals Board cannot dismiss a request for review after it has been timely perfected. Claimant responds and argues that the Appeals Board, acting in a judicial capacity, has inherent authority to make rules and orders and to enforce them when necessary for efficient adjudication of cases.

At this time, the Division of Workers Compensation has not officially promulgated rules and regulations that apply to Appeals Board procedures. Accordingly, the respondent is correct in arguing that the Appeals Board has no authority to dismiss a timely filed Application for Review. However, in an effort to establish procedures to help in the expedient processing of appeals before the Appeals Board, it has established some voluntary briefing procedures that the Appeals Board assumed would be respected and followed by all parties. If a party cannot meet a certain briefing deadline, it would be reasonable and appropriate for that party to contact the opposing party and arrive at some mutually agreed to new briefing dates. In the case at hand, the respondent chose not to follow this procedure. With respect to this Motion, the Appeals Board, however, finds that the appeal was timely filed and the Motion for Dismissal of Review must be denied.

The parties stipulated that claimant injured her back on May 30, 1991, while performing work activities for the respondent. She was first treated by her family physician and then by A. Ervin Howell, M.D., an orthopedic surgeon then located in Junction City, Kansas. Dr. Howell first saw the claimant on June 19, 1991 and treated her conservatively. However, after she did not make any progress, he referred her to other specialists who also did not have much success in helping the claimant. Dr. Howell saw her on a continuous basis until January 9, 1992. His diagnosis was chronic cervical strain/sprain. Dr. Howell last saw claimant on August 25, 1993, when he evaluated her for permanent impairment. He concluded that in accordance with the AMA Guides the claimant had a ten percent (10%) permanent partial impairment to the body as a whole. He then placed permanent restrictions on her of no lifting more than ten (10) pounds with either upper extremity; no lifting more than ten (10) pounds above shoulder level; no overhead work; and, she was not to perform jobs requiring repetitive motion of her arms and shoulders.

Respondent had the claimant evaluated by Dr. Craig Yorke, a neurosurgeon in Topeka, Kansas, on March 31, 1992. Dr. Yorke saw the claimant only once for evaluation purposes and not for treatment. He did have the benefit of claimant's prior medical records. Dr. Yorke's diagnosis was chronic strain of thoracic spine and right shoulder. Even though Dr. Yorke's examination did not result in any objective findings, he did assign a one percent (1%) permanent partial disability to the body as a whole. He based this

finding on claimant's subjective complaints and her being a credible person. Dr. Yorke also placed a fifteen (15) pound lifting restriction on claimant's right arm only.

Respondent argues that claimant has not suffered any permanent partial disability as a result of a work-related accident of May 30, 1991. In the alternative, if it is found that she has suffered a permanent disability, such disability should be based only on functional impairment and not on work disability. The respondent contends that claimant's impairment ratings and permanent restrictions are based entirely upon the subjective complaints of claimant. The respondent further argues that claimant's testimony is not credible as she was not truthful in regard to her average weekly wage and, further, she was employed outside her work restrictions while she was receiving temporary total disability benefits.

At claimant's attorney's request, claimant was interviewed and evaluated by Monty D. Longacre, vocational rehabilitation consultant, in reference to the issue of work disability on August 12, 1993. Based on Dr. Howell's permanent restrictions, Mr. Longacre opined that claimant had lost seventy-eight percent (78%) of her ability to perform work in the open labor market. He also expressed his opinion in reference to loss of claimant's ability to earn a comparable wage. Using a pre-injury wage of \$370 per week and a post-injury wage of \$180 per week, Mr. Longacre was of the opinion that claimant had lost fifty-one percent (51%) of her ability to earn a comparable wage. He also expressed his opinion on comparable wage loss by using a pre-injury wage of \$278 per week and a post-injury wage of \$180 per week for a thirty-five percent (35%) loss. The respondent did not present contradictory evidence on the issue of work disability nor did it request Mr. Longacre to express his opinion on work disability in reference to Dr. Yorke's medical report.

The Administrative Law Judge found that claimant's average weekly wage was \$231.59 based on the total amount that claimant earned while working for the respondent of \$2,051.88 divided by 8.86, the actual number of weeks claimant worked. Claimant argues that she was a full-time hourly employee as defined in K.S.A. 1990 Supp. 44-511(a)(5). Therefore, her average weekly wage should be figured based on forty (40) hours per week times the hourly rate she earned on the date of her accident of \$8.12, totaling an average weekly wage of \$324.80. See K.S.A. 1990 Supp. 44-511(b)(4)(B)(ii). The Appeals Board finds that the evidentiary record establishes that the claimant was a part-time employee, not a full-time employee. Claimant was working in the type of employment where there were no customary hours constituting an ordinary work day. See K.S.A. 1990 Supp. 44-511(a)(4)(B). Consequently, the Administrative Law Judge's finding that the claimant's average weekly wage was \$231.59 is affirmed as it was calculated based on claimant being a part-time employee pursuant to K.S.A. 1990 Supp. 44-511(b)(4)(A).

The Administrative Law Judge also found that the claimant was entitled to a permanent partial general disability of fifty percent (50%) based on work disability. He arrived at the fifty percent (50%) permanent partial general disability by weighing equally Monty Longacre's opinion of claimant's loss of ability to perform work in the labor market of seventy-eight percent (78%) with her loss of ability to earn a comparable wage of twenty-two percent (22%). See *Hughes v. Inland Container Corp.*, 247 Kan. 407, 799 P.2d 1011 (1990). The Administrative Law Judge calculated the comparable wage loss by using the claimant's average weekly wage of \$231.59 as a pre-injury wage and compared that with a post-injury wage of \$180.00 per week. The Appeals Board concludes that the fifty

percent (50%) permanent partial disability finding of the Administrative Law Judge is supported by the greater weight of the evidentiary record and thus affirms the Award of the Administrative Law Judge.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Special Administrative Law Judge William F. Morrissey, dated February 17, 1995, should be, and is hereby, affirmed as follows:

AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Pamela M. Colon, and against the respondent, EDP Enterprises, Inc., and its insurance carrier, New Hampshire Insurance Company, for an accidental injury which occurred on May 30, 1991 and based on an average weekly wage of \$231.59.

Claimant is entitled to 85.71 weeks of temporary total disability compensation at the rate of \$154.40 per week or \$13,233.62, followed by 329.29 weeks at the rate of \$77.20 per week or \$25,421.19 for a 50% permanent partial general body work disability, making a total award of \$38,654.81.

As of August 14, 1995, there is due and owing claimant 85.71 weeks of temporary total disability compensation at the rate of \$154.40 per week or \$13,233.62, followed by 133.86 weeks of permanent partial disability compensation at the rate of \$77.20 per week in the sum of \$10,333.99, for a total of \$23,567.61 which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of \$15,087.20 is to be paid for 195.43 weeks at the rate of \$77.20 per week, until fully paid or further order of the Director.

All other findings and orders of the Special Administrative Law Judge contained in the Award, dated February 17, 1995, are affirmed and adopted by the Appeals Board as its own.

IT IS SO ORDERED.

Dated this ____ day of August 1995.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Steven Hornbaker, Junction City, KS
John B. Rathmel, Overland Park, KS
William F. Morrissey, Special Administrative Law Judge

PAMELA M. COLON

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DOCKET NO. 157,361

Philip S. Harness, Director